IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 01-455-A
	)	
ZACARIAS MOUSSAOUI	)	

REPLY TO GOVERNMENT'S POSITION ON COMPETENCY AND DEFENDANT'S SELF-REPRESENTATION

In a thirty-seven (37) page submittal styled Government's Position on Competency and Defendant's Self-Representation ("Gov't. Memo"), the government would have the Court (1) rush to judgment on the issue of competency to waive the right to counsel; (2) conduct an immediate inquiry to see if waiver of right to counsel is knowing and voluntary; and (3) if so, grant Mr. Moussaoui his *Faretta* right so bound up in restrictions that it is no right at all.

For reasons we explain, it is premature to close the competency inquiry. The supplemental report of experts retained by the defense dated June 10, 2002 suggests that further examination is required, Dr. Patterson's most recent report notwithstanding.[1] Therefore it is also premature to conduct an inquiry to determine whether the right to counsel has been knowingly and voluntarily waived.

If, after further examination it turns out that Mr. Moussaoui is competent to waive his right to counsel and he proceeds to satisfy the Court that his waiver is knowing and voluntary, he should then be granted the full benefit of his Sixth Amendment right. As the government describes this right, quoting from *McKaskle v. Wiggins*, 465 U.S. 168, 174, 177 (1984):

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[1] Evaluation of Competence: Waiver of Right to Counsel Supplemental Report of June 10, 2002 ("June 10, 2002 Report") is attached as Exhibit A.

> [Mr. Moussaoui has the right] "to conduct his defense as he sees fit, to 'present his case in his own way' . . . [and] 'to control the organization and content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial.

(Gov't. Memo at 17) (citations omitted). The government, however, proposes restrictions on this right that render it meaningless. The Court should refuse to impose these restrictions. However, should the Court decide that these restrictions are justified, it should deny the *Faretta* waiver rather than compromise other constitutional rights and set this case on a course where a fair trial is impossible.

I. THE QUESTION THAT BEGS AN ANSWER

At the hearing on April 22, 2002, Mr. Moussaoui accused his current counsel of being in a conspiracy to kill him. (Tr. at 5-8.) He essentially repeats the assertion that his counsel want him dead in his most recent meeting with Dr. Patterson.[2] Yet, if Mr. Moussaoui's waiver of counsel is accepted, the government would nevertheless seek to impose current counsel on Mr. Moussaoui in an expansive standby capacity. (Gov't. Memo at 35.) In this standby capacity, the government suggests that current counsel could handle certain critical aspects of the proceedings for Mr. Moussaoui (Gov't. Memo at 35-36) despite the fact that Mr. Moussaoui currently has no relationship with them and does not want any.[3] The government's plan blithely glides over this reality.

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[2] '[T]here will be manipulations . . . lawyers want to say I'm crazy now, then at guilt phase, he's sane so they can impose death penalty." (June 7, 2002 Report at 5.)

[3] Mr. Moussaoui needs a computer if he is to make any use whatsoever of government discovery. Yet, he has refused to communicate with counsel concerning that fundamental necessity of defense preparation.

There is a fundamental question that must be answered before proceeding further, *i.e.*, why does Mr. Moussaoui believe that his current counsel are trying to kill him? Until this question is answered, no decision should be made on Mr. Moussaoui's attempted *Faretta* waiver. The answer to the question that begs to be asked has to be one of the following:

1. The belief is a manifestation of paranoid thinking which is the product of mental illness;

2. The belief is a truly held, but mistaken, belief which is the product of rational thinking common to a person of his "subculture";

3. The belief is a combination of (1) and (2); or

4. The belief is not truly held and is a false statement made by Mr. Moussaoui in an attempt to cynically manipulate the Court into giving him a platform to broadcast religious and political views.

If numbers one (1) and/or three (3) above be the case, Mr. Moussaoui is not competent to waive counsel. If number two (2) above be the case, current counsel should not be foisted upon Mr. Moussaoui in a role as standby counsel which requires substantial interaction with him. If number four (4) above be the case, Mr. Moussaoui's request to represent himself should be denied.

Dr. Patterson would no doubt opt for the second answer to the question, *i.e.*, that Mr. Moussaoui's belief is not the product of mental illness, but is instead a truly held belief which is supported by his "subculture" and not mental illness. (June 7, 2002 Report at 9.)[4] If that be the

[4] Dr. Patterson does not elucidate in his report how he determined other persons of Mr. Moussaoui's subculture would act or believe as Mr. Moussaoui does in Mr. Moussaoui's situation. The Declaration of Imam Sharif Battikhi which is attached hereto as Exhibit B, suggests that contrary to Dr. Patterson's view, Mr. Moussaoui is not acting consistently with the belief system of his subculture.

case, Mr. Moussaoui may be competent to waive counsel, but he will never work with current counsel even in a standby capacity, and the government's proposal to set up a procedure whereby this would be required should be rejected.

Unlike Dr. Patterson, retained defense experts are of the opinion, having reviewed Dr. Patterson's June 7, 2002 report,

> 'That there is not a sufficient basis at this time to conclude that the defendant's desire to proceed *pro se* is due solely to beliefs that are supported by his subculture. While it may eventually prove to be the case that some of his beliefs are so supported, we are of the opinion that delusional beliefs, having their influence either autonomously or in complex interaction with culturally determined political/religious beliefs, cannot be ruled out at this time, especially within a context that continues to lack the fruits of a full and adequate forensic health examination."

(June 10, 2002 Report at 3.)

These experts see the likelihood that the first and/or third answers to the above question, *i.e.*, that Mr. Moussaoui's conspiratorial, paranoid beliefs about current counsel are the product of mental illness, may be appropriate. For reasons set forth below, this possibility must be more authoritatively and convincingly ruled out than it has been to date before any proceeding which could lead to accepting a waiver of the right to counsel is commenced.

Finally, should the Court conclude that the answer is number (4) above, *i.e.*, that Mr. Moussaoui does not really believe that his current counsel are trying to kill him, but that he is instead expressing such a belief in an effort to manipulate the Court, then his effort to exercise his *Faretta* right should be denied. (*See* discussion in Gov't. Memo at 13-14.)

We note in Dr. Patterson's report that Mr. Moussaoui makes reference to a Texas lawyer upon whom Mr. Moussaoui was "waiting [for the lawyer] to get back with Mr. Moussaoui on

matters they had discussed." (June 7, 2002 Report at 5.) To the extent that Mr. Moussaoui intends to have counsel of his own choosing in any capacity, his counsel waiver should be denied as not clear and unequivocal. To assert the *Faretta* right, a defendant must clearly and unequivocally inform the Court that he wants to represent himself and does not want counsel. *United States v. Frazier-El*, 204 F.3d 553, 558 (4th Cir.), *cert. denied* 531 U.S. 94 (2000). "[A] defendant has no constitutional right to represent himself and have access to 'advisory' or 'consultive' counsel at trial," *Thomas v. Newland*, ___ F. Supp ___, 1999 U.S. Dist. LEXIS 1393 at *16 (N.D. Cal. 1999) (quoting *United States v. Kienenberger*, 13 F.3d 1354, 1356 (9th Cir. 1994), even if such counsel is retained, *United States v. Hill*, 526 F.2d 1019, 1024 (10th Cir. 1975), and any attempted counsel waiver proffered upon the expectation that there will be assistance from counsel, even in a consultative role, should be rejected as an equivocal waiver.

II. IT IS PREMATURE TO FORECLOSE THE COMPETENCY ISSUE

Progress is being made on the determination of competency, but we are not there yet. Dr. Patterson has actually made contact with Mr. Moussaoui, and this is better than where we were. We still believe a trip to FCC Butner may be necessary, but perhaps not. Mr. Moussaoui has not yet submitted to a full psychiatric examination nor answered all of the relevant questions put to him by Dr. Patterson. Dr. Patterson's most recent report is riddled with pertinent mental health evaluation questions which Mr. Moussaoui refused to answer. Further, Mr. Moussaoui's responses to those questions he did answer raise even more questions than they answer. Accordingly, experts retained by the defense still have serious reservations about Mr. Moussaoui's competence, notwithstanding Dr. Patterson's conclusion.

The defense experts note in their June 10, 2002 supplemental report that they agree with Dr. Patterson's assertion in his May 31, 2002 report regarding the need for a "full psychiatric examination" to address the question of mental disease or defense, but observe that the defendant has succeeded in preventing such an examination, notwithstanding Dr. Patterson's two (2) hour visit with him on June 7, 2002. They also agree with Dr. Patterson's conclusion that it is impossible to determine at this time whether Mr. Moussaoui's statements to Dr. Patterson (regarding his "specific information regarding the September 11th attacks," or the "'conspiracy' to prevent this information from becoming known through his court participation" (June 7, 2002 Report at 7) [reflecting motives/beliefs that are central to the defendant's desire to proceed *pro se*]) are based on a delusional process or not.[5] They differ from Dr. Patterson, however, in that they conclude that without such a determination, it is not possible to determine whether the counsel waiver is knowing and voluntary or the product of a mental disease or defect. (June 10, 2002 Report at 1-2.) These experts conclude by stating that "Dr. Patterson's report expands rather than eliminates the bases for continuing concern that Mr. Moussaoui's thinking . . . may be inspired by mental disease or defect" and that "Dr. Patterson's interview . . . did not constitute an examination of sufficient scope or depth to answer the Court's questions . . . with respect to the defendant's capacity to make a competent waiver of his right to counsel." These concerns need to be addressed, not peremptorily swept away as the government would have the Court do.

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[5] Once again, counsel have no idea as to what the defendant is talking about. Mr. Moussaoui has repeatedly stated that he has told current counsel nothing of significance. (April 22, 2002 Hearing Transcript at 16, 21.) Now he claims counsel are conspiring to kill him to keep him from revealing some heretofore undisclosed secret he wants to divulge in open court. If the Court should decline to order further competency evaluations, it must, at least, inquire *ex parte, in camera*, into what Mr. Moussaoui is talking about because it may well reveal an inappropriate purpose for pursuing a *Faretta* waiver.

Mr. Moussaoui should be directed to participate in an examination by experts retained by the defense to see whether issues of his competency can be put to rest. If one had a life-threatening disease and was facing a risky treatment protocol, it would not only be prudent, but perhaps foolish, not to have a "second opinion." Indeed, a responsible professional would probably request such an opinion himself where, as here, life or death could hang in the balance. Given that the government's purpose here is to convict and execute Mr. Moussaoui, its contention that Mr. Moussaoui is competent based on the opinion of a psychiatrist who has had only two (2) hours with him during which Mr. Moussaoui refused to answer questions necessary to a complete examination should not be allowed to control where life is at stake.

What we propose here will not delay the trial of this case. Ordering Mr. Moussaoui to cooperate with further examinations, and therefore not making a determination on his competency to assert his *Faretta* right at this time, need not halt these proceedings. In proposing that counsel, even as standby, could represent defendant's interests at a hearing Mr. Moussaoui would not even attend, the government states, "[a]s long as standby counsel does not adversely affect the *pro se* defendant's control over the case he presents to the jury, which the Supreme Court has labeled the 'core of the *Faretta* right,' there is no constitutional foul" (Gov't. Memo at 34) (citing *McKaskle*, 465 U.S. at 178). The government makes this point with regard to motions and proceedings under CIPA, and says "there would be no violation of a defendant's *Faretta* right as standby counsel's participation in CIPA proceedings would, by definition, not compromise the defendant's preeminence in front of the jury." (Gov't. Memo at 35.)

We agree with the government's general point, *i.e.*, that counsel, even as standby, could act for the defendant on certain pre-trial matters, but not as they would apply it to CIPA proceedings.

Because the CIPA hearings are inextricably intertwined with the factual development of the case, standby counsel could never be an adequate substitute at a CIPA proceeding for a defendant acting as his own lawyer. But the point made by the government, *i.e.*, that the core *Faretta* right is not compromised by counsel's participation to the exclusion of the defendant in pre-trial matters, particularly those that involve purely questions of law, is sound. Accordingly, matters such as legal argument on the Death Notice and pre-trial motions which do not require evidentiary hearings could proceed.[6] If Mr. Moussaoui in the interim fully cooperates with the Court's orders to submit to the further examination we request, it will only be a short additional time, assuming Dr. Patterson is correct, until the Court can address other aspects of the *Faretta* waiver.[7] Per *McKaskle* and the government, there would be no prejudice to Mr. Moussaoui's *Faretta* right in proceeding in this manner, no delay in the overall proceedings, and the Court would have much greater confidence in the competency evaluation. Mr. Moussaoui can continue with the preparation of his defense in the interim.

Important here is that there is no harm in proceeding in the fashion we suggest, while rejecting this approach and adopting the rush to judgment advocated by the government brings with it great risk, *i.e.*, that Dr. Patterson, who concedes reasonable minds might differ, has erred on the question of Mr. Moussaoui's competency and, in a death case, the Court might then accept a waiver of the right to counsel from a defendant who is not competent to give it.

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[6] If death were to come off the table during these proceedings; we would be far less concerned with proceeding with the case on the current record as to competence.

[7] Mr. Moussaoui's failure to cooperate would dictate that his *Faretta* right would be denied—and the Court should make this clear to him. He must not just see the examiners, he must fully cooperate with the examination.

The government will argue that the Court can make its own diagnosis during an extended *Faretta* waiver inquiry. Counsel urge the Court not to undertake such an effort. It is only over a spectrum of many interactions (well over 100 hours) with Mr. Moussaoui that signs of a mental health issue became manifest to counsel, and even then it took consultation with persons of appropriate professional training to understand what those signs meant. Mr. Moussaoui's intelligence helps to conceal the underlying problem in any meeting of short duration where he can appear quite intelligent and engaging. This is why we question Dr. Patterson's current opinion and why we ask the Court not to itself undertake this task.

III. THE GOVERNMENT'S PROPOSED RESTRICTIONS ALLOW ONLY THE APPEARANCE OF A *FARETTA* RIGHT

The government advances seven (7) restrictions it would seek to impose on Mr. Moussaoui if he is allowed to represent himself.[8] Two of these, denial of access to sensitive and classified discovery and limitations on contacts with the outside world, are addressed in our Motion for Access by Defendant to Classified Information and Sensitive Discovery and for Relief from Special

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[8] "(1) continue to bar the defendant's access to classified and other highly sensitive material; (2) withhold the names and addresses of veniremen and addresses of witnesses it may call in the case as is permitted under 18 U.S.C. § 3432; (3) limit the defendant's access to research materials and closely scrutinize the defendant's access to visitors other than counsel of record; (4) adopt strict security measures during all court proceedings, including the trial, such as the use of stun belts or other physical restraints; (5) briefly delay the public filing of any submissions by the defendant until they can be reviewed for harmful or coded messages, and to advise the defendant that he may not pass on such messages during any court proceedings; (6) that the defendant not be permitted to cross-examine certain victim witnesses, and (7) that his participation in any depositions pursuant to Fed. R. Crim. P. 15, particularly of any foreign witnesses, be limited or that they be conducted by standby counsel."

(Gov't. Memo at 29.)

Administrative Measures Concerning Confinement ("Defendant's Access Motion"). Imposition of these restrictions effectively deny Mr. Moussaoui the opportunity "to control the content and organization of his own case," *McKaskle*, 485 U.S. at 177, and, therefore, effectively deny Mr. Moussaoui the very right he seeks to secure.[9]

Even assuming *arguendo* that counsel, acting as standby counsel, had a working relationship with Mr. Moussaoui, which they do not, they would not be able to share the classified and sensitive discovery information with Mr. Moussaoui so that he could determine the organization and control of his own defense. Such a large part of the discovery is designated either classified or sensitive that no credible argument can be made that Mr. Moussaoui would be in control of his defense when only standby counsel would have access to this material. The government tries to justify the withholding of information from the defendant with a string cite of cases (Gov't. Memo at 29-30) which involve restricting a defendant's access to certain types of information. The government neglects to mention, however, *that none of these cases involve a pro se defendant*. Nor do the library access cases cited at Gov't. Memo pages 22-23 have anything at all to do with denying a *pro se* defendant personal access to discovery, *Brady* material and witnesses.

The government argues in its papers that restrictions on Mr. Moussaoui's right to proceed *pro se* can be justified because "'the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer,'" quoting from *United States v. Frazier-El*, 204 F.3d, 559 (4th Cir.), *cert. denied*, 531 U.S. 994 (2000). We agree that there is a "weighing" process to be followed here, but we disagree on what it is that must be weighed.

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[9] **[UNDER SEAL, *EX PARTE, IN CAMERA*]**

Assuming , *arguendo*, that competence has been determined and the *Faretta* waiver is being considered, this weighing process must first begin with a determination as to whether the government's security concerns outweigh Mr. Moussaoui's rights, as a *pro se* litigant, to himself see the evidence and the *Brady* material, *i.e.*, sensitive and classified discovery information, and have unfettered access to third party witnesses and experts, at least by telephone. If the Court determines that the government's security interests outweigh the defendant's unfettered exercise of his *Faretta* right, the Court must proceed to weigh the corresponding limitation on other constitutional rights (*e.g.*, *Brady v. Maryland*, 373 U.S. 83 (1963), *California v. Trombetta*, 467 U.S. 479, 485 (1984) (due process constitutionally guarantees access to evidence and to present a defense), *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986) (Sixth Amendment guarantee of opportunity for effective cross-examination)), against the right to proceed *pro se*. These other rights, unlike the *Faretta* right which is not absolute, *are* absolute and as we contend in the Defendant's Access Motion, are non-waivable because a defendant who has not seen the information cannot know what it is he is waiving. Accordingly, if the Court concludes that it cannot allow Mr. Moussaoui his right to see sensitive and classified discovery information and have access to third party witnesses for national security reasons in order to prepare a *pro se* defense, the Court should then decline to grant the right to self-representation altogether on national security grounds rather than grant a waiver which would waive much more than just the right to counsel, it would waive the right to a fair trial.

Respectfully submitted,

ZACARIAS MOUSSAOUI
By Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Reply to Government's Position on Competency and Defendant's Self-Representation was served by hand upon AUSA Robert A. Spencer, AUSA David J. Novak, and AUSA Kenneth M. Karas, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, Virginia 22314 this 11th day of June, 2002.

Frank W. Dunham, Jr.

EXHIBIT A

[REDACTED]

EXHIBIT B

DECLARATION OF IMAM SHARIF BATTIKHI

1. I, Imam Sharif Battikhi, make this Declaration on the basis of my personal knowledge. If called upon to testify about its contents, I would testify consistently with it.

2. I am an Islamic cleric. The Arabic word for an Islamic cleric is "Imam." I have a Bachelors of Arts Degree in Islamic law from the Islamic University of Medina, Saudi Arabia. Presently I am the director of the American Islamic Services Foundation in San Diego, California. Previously, I was the Director (and Imam) of the San Diego Islamic Center (1984-1992). Before that, I was the Imam and Administrator of the Islamic Cultural Center of the University of Jordan, in Amman, Jordan, from 1979 to 1983. I am an American citizen. I also am a member of the Islamic Society of North America, the Islamic World League, the National Conference of Christians and Jews, and the Arab American Advisory Board of the San Diego Police Department. I am an accredited Imam who ministers to Muslim prisoners held at the San Diego Metropolitan Correctional Center and at the Donovan State Correctional Facility in San Diego. I have spent my life studying the religion of Islam as embodied in the Noble Quran and the Sayings of the Prophet Mohammed (Peace be upon him)(the Sayings are commonly known as the "Hadith"), and the Shariah, the body of Islamic law.

3. I understand that brother Zacarias Moussaoui has refused to allow himself to be represented by his appointed attorneys. At this writing, he refuses to meet with them; and recently he has rejected a letter from his Mother and a visit from a Muslim attorney retained by her to meet with him to discuss his situation. I further

understand that he may misapprehend the Islamic religion and believe, first, that he may not be represented by non-Muslims; and second, that as a Muslim, he must defend himself against the charges which have been brought against him. He is wrong in several respects. According to Islam, he must obey his Mother's wishes; he may rely on non-Muslims to defend him; and he may not defend himself if to do so would ultimately result in the sacrifice of his life. I am informed that he faces charges that could result in the death penalty and that any attempt to defend himself against such charges probably would result in his conviction and sentence to death.

4. Islam demands that Muslims obey the wishes of their parents. This is clearly stated in the Noble Quran and the Sayings of the Prophet (Peace be upon him). "Worship Allah and join none with Him (in worship); and do good to parents . . .." (Sura 4, Verse 36.) "And your Lord has decreed that you worship none but Him. And that you be ***dutiful to your parents***. If one of them or both of them attain old age in your life, say not to them a word of disrespect, nor shout at them but address them in terms of honor. And lower unto them the wing of submission and humility through mercy, and say: 'My Lord! Bestow on them Your Mercy as they did bring me up with I was young." (Sura 17, Verses. 23-24.) "And We have enjoined on man to be good and ***dutiful*** to his parents . . .." (Sura 29, Verse 8.)

5. Islam is pro-life. Life is a sacred gift from Allah. It is not to be taken for granted and not to be wasted. If there is a breath of life, it is to be lived; and every effort must be made to preserve it. "O you who believe! Eat not up your property among yourselves, unjustly except it be a trade amongst you, by mutual consent. And ***do not kill yourselves (nor kill one another)***. Surely Allah is Most Merciful to you." (Sura

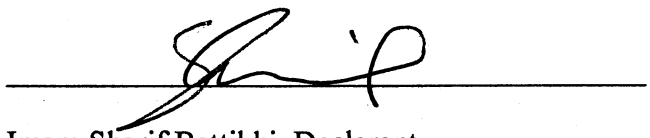
4, Verse 29.) "O my sons! Go you and inquire about Joseph and his brother, and never give up hope of Allah's Mercy. Certain no one despairs of Allah's Mercy, except the people who disbelieve." (Sura 12, Verse 87.) "No one should wish for death because of any misfortune that befalls him. If anybody should be so much hard up with life he should say: 'Allah, keep me alive so long as life is good for me, and I may die when death is better for me." (Sayings, No. 40, Hazrat Anas bin Malik.) "None of you should pray for (his own) death, because if he is a good person, it is possible that he might add to his virtuous deeds, and if he is not a good person, he might get a chance to rectify his (evil) past. (Sayings, No. 585, Hazrat Abu Hurairah.) "Indeed, whoever (intentionally) kills himself, then certainly he will be punished in the Fire of Hell, wherein he shall dwell forever." (Sayings, Salhih Al-Bukhair and Muslim.) Finally, the Hadith forbids suicide even to the wounded soldier. "The Prophet (Praise Be His Name) said, 'A man was inflicted with wounds and he committed suicide, and so Allah said: My slave has caused death on himself hurriedly, so I forbid Paradise for him." (Sayings, No. 683, Thabit bin Ad-Dahhak.)

6. During his lifetime, the Prophet (Peace be upon him) used any means at his disposal to protect Islam and his followers. Thus, when he and his band of followers were forced to flee from Mecca to Medina in the fifth year of his prophethood (ca. 622 AD), he allowed certain of his followers to seek refuge in Abyssinia under the protection of King Ashamah Negus, a Christian. There, idolaters who had traveled from Mecca importuned the King to place the Muslims in their custody, which meant certain death. The King refused. (The Biography of the Nobel Prophet, Safi-ur-Rahman al-Mubarakpuri, pp. 103-105.) All Muslims live by the example of the

Prophet (Praise Be His Name). There is no Quranic or Islamic prohibition against using non-Muslims for protection. The Prophet (Peace be upon him) did so, and Zacarias Moussaoui may do so by using non-Muslim lawyers in presenting his defense to the charges brought against him.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Diego, California, on June 10, 2002.



Imam Sharif Battikhi, Declarant

LEXSEE 1999 US Dist LEXIS 1393

TOMMY THOMAS, Petitioner, vs. ANTHONY NEWLAND, Respondent.

No. C-96-0547 MHP

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

1999 U.S. Dist. LEXIS 1393

February 2, 1999, Decided

February 2, 1999, Filed; February 4, 1999, Entered in Civil Docket

DISPOSITION:
[*1] Thomas petition for writ of habeas corpus DENIED and case DISMISSED in its entirety.

COUNSEL:
TOMMY THOMAS, Plaintiff, Pro se, Vacaville, CA.

For ANTHONY NEWLAND, defendant: Martin S. Kaye, CA State Attorney General's Office, San Francisco, CA.

JUDGES:
MARILYN HALL PATEL, Chief Judge, United States District Court, Northern District of California.

OPINIONBY:
MARILYN HALL PATEL

OPINION:

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Tommy Thomas is a prisoner of the State of California incarcerated at Solano State prison. Thomas brought this *pro se* petition for writ of habeas corpus pursuant to *28 U.S.C. section 2254* to challenge his state court conviction of evading a police officer and unlawfully taking a vehicle, with a prior similar conviction, in violation of California Vehicle Code sections 2800.2 and 10851. On September 8, 1994, petitioner was sentenced to six years in state prison. Petitioner appealed his conviction to the California Court of Appeal, which affirmed the conviction in 1995. He petitioned the California Supreme Court for review of the Court of Appeal's decision, but his petition was denied on January 17, 1996. Petitioner now seeks habeas corpus relief by [*2] raising the following claims: (1) ineffective assistance of counsel and (2) denial of his right to represent himself. By order filed May 22, 1996, this court found petitioner's claims cognizable and ordered respondent to show cause why a writ should not issue. Respondent filed an answer and opposition, and petitioner filed a traverse. This action has been submitted on the papers.

Having considered the parties' arguments and submissions, and for the following reasons set forth below, the court enters the following memorandum and order.

BACKGROUND n1

n1 Unless otherwise indicated, all information in this section is drawn from the State Court Reporter's Transcript ("R.T. at #") submitted by respondent.

Petitioner was arrested on May 19, 1994, after several uniformed police officers identified him as the driver of a stolen car who initiated a high-speed chase reaching up to 100 miles per hour. R.T. 62-64, 150-51, 192, 197, 202, 204. The car had been stolen sometime on or after the evening of May 18, 1994. [*3] R.T. 238-42. The officers found petitioner lying down behind bushes in the location where the chase culminated. R.T. 93-96, 98. Petitioner's fingerprints were not found in the stolen car. R.T. 389. Following his arrest, petitioner stated that he did not commit the crime and stated that he was hiding in the bushes because he was paranoid of the police, having once been bitten by a [police] dog. R.T. 178-80, 182.

Petitioner testified that he spent the night of May 18, 1994, at his girlfriend Bronda Johnson's house and went to work the next day, May 19, 1994, quitting at about 4:00 p.m. R.T. 256-57, 263. Petitioner's mother, Katherine Webb, testified that she last saw petitioner between 9:00 and 10:00 p.m. on May 19, 1994, but did not let him in her house because he appeared "quite high." n2 R.T. 348, 349-50, 352. According to petitioner's testimony, at about 10:45 or 11:00 p.m. he went to Barbara Lawson's house, where he had brief contact with Lawson and Kenny Spencer, and drove home at about 11:00 p.m.

n3 R.T. 246, 255, 280-82, 284.

n2 Lawson's residence is about ten blocks from the location where petitioner was identified prior to the high speed chase. R.T. 242-243.

[*4]

n3 When questioned about his precise activities on May 19, 1994, petitioner responded "it's hard to say." R.T. 259, 270.

In his petition for writ of habeas corpus, petitioner contends that his trial counsel failed to investigate five witnesses, including an alibi witness, and failed to subpoena the witnesses to ensure their presence at trial. Petitioner only named two of these witnesses, Johnson and Lawson, in his petition to the court of appeal, and presented that court with a declaration stating that he requested trial counsel to investigate and subpoena Johnson and Lawson. n4 Respondent's Answer and Opposition at 9. Petitioner also presented Johnson and Lawson's declarations to that court, but their declarations were found to be "confused and contradictory" and to have "undermined rather than strengthened" petitioner's alibi defense. R's Answer at 9.

n4 Citation to Respondent's Answer and Opposition will be in the form "R's Answer at #," and includes exhibit references which have been lodged with the court.

[*5]

The declarations of the three remaining alleged witnesses, Surina Thomas, Spencer and Officer Merson, were only appended to petitioner's petition for review to the California Supreme Court. R's Answer at 10. There is some dispute over whether petitioner informed trial counsel about these alleged witnesses and the nature of their testimony, or that petitioner desired such testimony. n5

n5 Surina Thomas, petitioner's sister, avers that petitioner arrived at her residence on May 19, 1995 at about 10:05 p.m., as she and a friend were leaving, and that petitioner was not there when she returned at 11:30 p.m. (The court notes that there is some dispute about the accuracy of this date, as the crime occurred on May 19, 1994, but it does not affect the court's decision.)

Spencer's declaration avers that he was at Lawson's when petitioner arrived on May 19, 1994 at 11:00 p.m., and that petitioner stayed for a brief time and was driving his own vehicle. Spencer does not say how he knew petitioner was driving his own car.

[*6]

In his habeas petition, petitioner also claims that the trial court denied him the right to self-representation. On August 1, 1994, petitioner filed a *pro per* motion entitled "Motion to be Co-Counsel." The content of the motion stated that petitioner wished to be appointed advisory counsel and averred that petitioner was indigent and could not afford advisory counsel. R's Answer, Exh. A at 69. The same motion also cited to *Faretta v. California, 422 U.S. 806, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (1975)*. The court clarified the nature of the motion by asking petitioner if it was a motion to be co-counsel. After confirming that petitioner's request was for co-counsel status, the trial court found that there was no showing on the record that co-counsel status was necessary. R's Answer at 12. On appeal, petitioner contended that the trial court erred in denying the motion without any inquiry because the motion was "alternatively" one for self-representation or self-representation with the assistance of advisory counsel. R's Answer, Exh. B at 7 & n.5. The court of appeal stated that, "it is hard to imagine how a motion which Thomas still characterizes as a motion to be made co-counsel [*7] can be an unequivocal assertion of the right to self-representation." n6

n6 The court of appeal referred to petitioner's sworn declaration in support of his state petition for writ of habeas corpus, which was consolidated with his appeal.

LEGAL STANDARD

The AEDPA amended several provisions of sections 2241-2255 of Title 28 of the United States Code. Although, Congress did not expressly state in the AEDPA that it should not apply to habeas actions already pending in federal court prior to its effective date, the intent not to apply the AEDPA retroactively to non-capital habeas petitions can be negatively implicated from provisions expressly applying the AEDPA retroactively to capital habeas petitions. See *Lindh v. Murphy, 521 U.S. 320, 327, 138 L. Ed. 2d 481, 117 S. Ct. 2059 (1997)*; cf. *Jeffries v. Wood, 114 F.3d 1484, 1495 (9th Cir. 1997)* (en banc) (finding no need to resort to negative inference because "a plain reading of section 107(c), coupled with the normal presumption of prospectivity, [*8] leads to the conclusion that the [] amendments do not apply to pending cases"), cert. denied, *522 U.S. 1008, 139 L. Ed. 2d 423, 118 S. Ct. 586 (1997)*. Consequently, the AEDPA does not apply to cases pending in the federal courts prior to its effective date of April 24, 1996. See *Lindh, 521 U.S. at 336-37*. Petitioner filed his habeas petition in federal court on February 12, 1996, approximately two months before the AEDPA took effect; therefore, review of his petition is

governed by the previous standard.

The pre-AEDPA habeas standard authorizes this court to review a state court criminal conviction "on the ground that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." *28 U.S.C. § 2254*(a) (West 1996). n7 Because federal habeas review delays finality and burdens state-federal relations, habeas review must balance the protection the writ offers from unlawful custody against "the presumption of finality and legality" that attaches to a state-court conviction after direct review. See *Brecht v. Abrahamson, 507 U.S. 619, 635-37, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993); McCleskey v. Zant, 499 U.S. 467, 490-91, 113 L. Ed. 2d 517,* [*9] *111 S. Ct. 1454 (1990).*

n7 Hereinafter all references to *28 U.S.C. § 2254* refer to the statute as it existed prior to the AEDPA.

Accordingly, a federal habeas court must in most cases presume that the state court findings of fact are correct. See *28 U.S.C. § 2254*(d). In contrast, purely legal questions and mixed questions of law and fact are reviewed de novo. See *Swan v. Peterson, 6 F.3d 1373, 1379 (9th Cir. 1993),* cert. denied, *513 U.S. 985, 115 S. Ct. 479, 130 L. Ed. 2d 393 (1994).* The precise showing required to establish a constitutional violation—and the placement of the burdens of production and proof—depends on the specific claim.

DISCUSSION

A. Ineffective Assistance of Counsel

In a federal habeas challenge to a state criminal judgment, a state court conclusion that counsel rendered effective assistance is not a fact binding on the federal court to the extent stated by section 2254(d). A petitioner claiming ineffective assistance of counsel must establish both deficient performance [*10] by counsel and prejudice to the outcome of his case. See *Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).* Both the performance and the prejudice components of the ineffectiveness inquiry are mixed questions of law and fact. See *id. at 698.* Claims of ineffective assistance therefore require a review of the record.

The Sixth Amendment guarantees not only assistance, but effective assistance of counsel. See *Strickland, 466 U.S. at 687.* The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. See id. To prevail on a claim of ineffective assistance of counsel, petitioner must meet both prongs of the Strickland test. *Id. at 687.*

Petitioner claims that counsel's failure to call the five witnesses—Surina Thomas, Lawson, Johnson, Officer Merson, and Spencer—constituted ineffective assistance of counsel. Because the court finds that petitioner failed to show how counsel's omission here constitutes prejudice under the Strickland test, the court will not reach [*11] the question of counsel's deficiency. *Id. at 697; Williams v. Calderon, 52 F.3d 1465, 1470 & n.3 (9th Cir. 1995)* cert. denied, *516 U.S. 1124, 133 L. Ed. 2d 863, 116 S. Ct. 937 (1996)*(approving district court's refusal to consider whether counsel's conduct was deficient after determining that petitioner could not establish prejudice).

The test for prejudice is not outcome-determinative, i.e., petitioner need not show that the deficient conduct more likely than not altered the outcome of the case; however, a simple showing that the defense was impaired is also not sufficient. See *Strickland, 466 U.S. at 693.* Petitioner must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. See *id. at 694.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. See *id. at 694;* see, e.g., *Brown v. Myers, 137 F.3d 1154, 1157 (9th Cir. 1998)*(failure to investigate and present available alibi witnesses prejudicial where, without corroborating witnesses, defendant's bare testimony left him without a defense). n8

n8 Petitioner's case can be distinguished from the facts in Brown because Brown's seven alibi witnesses would have conclusively placed him at another location, whereas petitioner's alibi witnesses cannot account for his whereabouts at the critical time of the crime. See *Brown, 137 F.3d at 1156-57.*

[*12]

The court finds that counsel's failure to call the five witnesses indicated by petitioner did not prejudice the outcome of petitioner's case. The potential contributions of these five witnesses fail to sufficiently strengthen the defense case. With or without these witnesses, it is likely that the outcome would have been the same; therefore, no prejudice resulted under *Strickland. 466 U.S. at 694.*

For example, Surina Thomas' declaration places petitioner at her residence at 10:05 p.m. on the night of the incident, and otherwise she cannot account for his whereabouts; she offers no alibi for petitioner "around eleven o'clock" when the crime took place. Surina Thomas Dec. at 1; R.T. 60. Johnson and Lawson likewise offer no alibi for the minutes during which the crime occurred. Johnson Dec. at 1; Lawson Dec. at 1. Lawson places Thomas at

her residence "at about 11:00 p.m." on the night of his arrest, shortly before the chase began. Lawson Dec. at 1. Lawson's declaration serves merely to place Thomas in a car in the vicinity immediately after 11:00 p.m. Johnson's declaration does not account for petitioner's whereabouts on either the night of the crime or on the night the Oldsmobile [*13] was stolen. Johnson Dec. at 1.

Officer Merson, the fingerprint technician, would have testified that petitioner's fingerprints were not found in the stolen car. This testimony would have been largely cumulative given that the prosecution presented evidence that the police dusted for prints but offered no evidence that petitioner's prints were found. R.T. 126. In addition, during closing argument, the prosecution conceded that no prints matching petitioner's were recovered in the car. R.T. 389. Furthermore, Officer Lum's testimony that failure to recover prints in a car is not unusual would have undermined the probative value of petitioner's fingerprint evidence. R.T. 129.

Finally, Spencer is the only witness whose testimony might have aided petitioner's defense. In his declaration Spencer placed petitioner in petitioner's own car near the time of the crime, not the stolen Oldsmobile. Spencer Dec. at 1. Nonetheless, even if Spencer presented credible testimony regarding petitioner's vehicle, his statement is not enough to meet the standard in Strickland. Petitioner is required to show that but for counsel's error, it is reasonably likely that the outcome would have been different. [*14] See *Strickland, 466 U.S. at 694.* Here, the state offered testimony of several police officers who identified petitioner as the man in the Oldsmobile. R.T. 62-64, 150-51, 192, 197, 202, 204. Furthermore, petitioner was discovered by police hiding among bushes in the path of the driver's flight. R.T. 93-96, 98. In light of this evidence, counsel's failure to present Spencer's testimony does not meet the prejudice prong of Strickland. n9

> n9 If this court should find that failure to present Spencer's testimony borders on prejudice to petitioner, it is nevertheless unlikely that counsel's failure to call Spencer meets the deficiency prong of Strickland. Petitioner has presented no evidence that he informed his counsel of Spencer's existence or requested his testimony.

B. Denial of the Right to Self-Representation

Petitioner claims that his "Motion to be Co-counsel" should have been treated as an assertion of the right to self-representation. Under section 2254(d), a federal court reviews *de novo* [*15] a state court's determination of a valid Sixth Amendment waiver, but the state court's findings of historical and subsidiary facts which underlay this determination are entitled to a presumption of correctness. See *Wells v. Maass, 28 F.3d 1005, 1011 (9th Cir. 1994).* Courts may indulge in every reasonable presumption against waiver of the right to counsel. See *United States v. Meeks, 987 F.2d 575, 579 (9th Cir. 1993),* cert. denied, *510 U.S. 919, 126 L. Ed. 2d 261, 114 S. Ct. 314 (1993).*

There is no constitutional basis for granting petitioner's motion for co-counsel status. See *McKaskle v. Wiggins, 465 U.S. 168, 183, 79 L. Ed. 2d 122, 104 S. Ct. 944 (1984).* To effectively waive the right to counsel, and thus assert the right of self-representation, a defendant must act "knowingly and intelligently; he must be aware of the nature of the charges against him, the possible penalties, and the dangers ad disadvantages of self-representation." See *Faretta v. California, 422 U.S. 806, 835, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (1975); Meeks, 987 F.2d at 579.* The request to represent himself must be unequivocal. See *Meeks v. Craven, 482 F.2d 465, 467 (9th Cir. 1973);* [*16] accord *Armant v. Marquez, 772 F.2d 552, 555 (9th Cir. 1985),* cert. denied, *475 U.S. 1099 (1986).* If a defendant equivocates, he is presumed to have requested the assistance of counsel. See *Adams v. Carroll, 875 F.2d 1441, 1444 (9th Cir. 1989).*

A defendant may of course also choose to be represented by an attorney; however, a "defendant does not have a constitutional right to 'hybrid' representation" at trial. See *McKaskle, 465 U.S. at 183; United States v. Kienenberger, 13 F.3d 1354, 1356 (9th Cir. 1994).* He or she therefore has no absolute right to serve as co-counsel after electing to be represented by counsel. Although the Supreme Court has noted that it may be wise to appoint standby counsel for a defendant who wishes to waive representation by counsel, a defendant has no constitutional right "to represent himself and have access to 'advisory' or 'consultative' counsel at trial." See *Kienenberger, 13 F.3d at 1356.*

A defendant's so-called Faretta motion cannot be construed as a motion for self-representation if the motion includes a request for co-counsel status or appointment of advisory counsel. See id. Petitioner's *pro per* motion was captioned [*17] as "Motion to be co-counsel." The trial court clarified the petitioner's request by confirming orally that it was indeed a request to be made co-counsel. Although petitioner cited Faretta in his motion, his request was clearly not to conduct his own defense, but to be given the status of co-counsel; therefore, petitioner never conclusively relinquished his right to representation by counsel. The trial court's denial of the motion was not error. Taking into account the United State Supreme Court's holding in *Haines v. Kerner, 404 U.S. 519, 520-*

21, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972), that a complaint by a pro se plaintiff must be held to "less stringent standards than formal pleadings drafted by lawyers" this court nonetheless finds that petitioner's motion for co-counsel status does not meet the unequivocality requirement of Faretta.

CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED that the petition for writ of habeas corpus is DENIED. This order fully adjudicated the motion reflected at Docket # 1 and the Clerk of the Court shall remove it from the pending motions list.

IT IS SO ORDERED.

Dated: 2-2-99

MARILYN HALL PATEL

Chief Judge

United [*18] States District Court

Northern District of California

JUDGMENT

Fed. R. Civ. Proc. 58

This action having come before this court, the Honorable Marilyn Hall Patel, United States District Judge presiding, and the issues having been duly presented and an order having been duly filed,

IT IS ORDERED AND ADJUDGED that the petition for writ of habeas corpus submitted by TOMMY THOMAS is DENIED, and this action brought by TOMMY THOMAS is dismissed in its entirety.

IT IS SO ORDERED.

Date: 2-2-99

MARILYN HALL PATEL

Chief Judge

United States District Court

Northern District of California